

Perry Broadcasting, Inc. and Newport Broadcasting, Inc. and Local 1228, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner. Case 1-RC-19325

December 31, 1990

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

On November 9, 1989, the Regional Director for Region 1 issued a Decision and Direction of Election finding that the petitioned-for unit limited to on-air personnel was inappropriate and directing an election in an overall unit including on-air programming employees, sales employees, the receptionist, and the traffic manager. The Petitioner filed a timely request for review of the Regional Director's decision, contending that the petitioned-for unit limited to on-air personnel is appropriate. The Employer filed a brief in opposition. On December 8, 1989, the Board granted the Petitioner's request for review.¹

The Board has considered the entire record in this case, including the brief on review, and has decided to reverse the Regional Director's conclusions and to find that the petitioned-for unit of on-air personnel is appropriate.

The Employer operates two radio stations out of a studio on the second floor of a commercial building in Newport, Rhode Island. WADK is an AM station with a news, talk, and music format. It operates during daylight hours. WOTB is an FM station with a jazz and new age music format. It operates 24 hours a day, but during off hours the station broadcasts a satellite program produced in Minneapolis, Minnesota. No on-air personnel are present when the satellite program is broadcast. The parties stipulated that the unit includes employees of both stations.

The unit found appropriate by the Regional Director includes nine full-time and two part-time on-air announcers, six sales employees, the traffic manager, and the receptionist.² The unit sought by the Petitioner is limited to the 11 on-air announcers.

General Manager Wayne Wunsch is in charge of the day-to-day operations of both stations and supervises both the on-air and the sales employees.³ Business Manager Joan Dreger reports to Wunsch and supervises the traffic manager and the receptionist. Although on-air and sales employees are commonly supervised

by Wunsch, program directors and sales managers play an intermediate role in coordinating the Employer's operations. For example, Robert Angel as program director for WADK, Tom Kogut as news director for WADK, and Steve Bianchi as program director for WOTB oversee the operations of the radio programs. The sales managers, one for each station, tell employees what accounts to call on, give advice about sales methods, and critique sales employees' work. The parties agree that neither the program directors nor the sales managers are supervisors.⁴

On-air personnel are engaged in programming and producing broadcasts from several studios at the Employer's facility. The amount of time spent on the air varies with the format presented, including talk shows, news programs, interviews, and music. On-air personnel engineer their own broadcasts. Engineering involves adjusting controls to regulate the broadcast sound, playing recorded music, and airing taped commercials. Music is played according to a music log prepared by an on-air employee. For commercials, announcers follow a log prepared by the traffic director. On-air employees engage in various promotions and contests. Some gather and edit news stories. Announcers present some live commercials, which they read from a script. Most commercials are taped. On-air employees produce those commercials based on production orders from sales employees. All full-time announcers are salaried, and the two part-time announcers are hourly paid. On-air personnel work a variety of hours to meet programming needs. They do not interchange with sales employees or perform sales work.⁵ The Employer hires only experienced on-air personnel.

Sales employees sell commercial air time for both stations. Their regular hours are from 8:30 a.m. to 5:30 p.m., although they sometimes work at other times to call on clients. Sales employees are paid draws against their commissions. The sales managers are additionally paid a salary. The sales personnel receive the same fringe benefits as on-air personnel. Because sales employees' principal duty is to sell commercials, they spend a substantial though unspecified amount of time away from the Employer's broadcast facilities. The Employer does not require prospective sales employees to have experience.

After securing sales contracts with clients, sales employees will sometimes write the advertising copy. It appears from the record as a whole, however, that more commonly they fill out a production order in which they write down what they want in a commer-

¹ An election was held December 8, 1989, in the unit found appropriate by the Regional Director. The ballots were impounded.

² The unit found appropriate comprises all the employees of both stations. The Regional Director excluded several people because they were independent contractors, casual employees, or seasonal employees. No request for review was filed as to the exclusions.

³ Bernard and Jane Perry, the president and the treasurer, are not engaged in day-to-day supervision.

⁴ The Employer also has a national sales manager who works by herself.

⁵ The one exception is on-air employee Robert Angel who works 30 to 40 percent of his time on sales. Like other announcers he is paid a salary for his announcing work, and like other sales employees he is paid a commission for his sales work. Because he spends a substantial part of his time on announcing work, he is a dual-function employee whom we will include in the unit we are finding appropriate.

cial, how many voices should be used, and what kind of sound effects or music they want. Production orders are given to on-air personnel to write the scripts. Once scripts are written, the commercials are actually produced by on-air personnel. In producing commercials, the on-air employees do not regularly use other employees' voices, although they have done so on occasion because they liked the sound of the other employee's voice or because they wanted a nonprofessional voice. Sales and on-air employees also work together on station promotions and contests. It appears that their interaction is similar to that in the production of commercials. Sales employees do not substitute for or interchange with on-air employees. They are not regularly heard on the air live. They have only infrequently broadcast live. For example, during a remote broadcast at a client's place of business, a sales employee may interview the client.⁶

The traffic manager works from 9 a.m. to 5 p.m. She enters information from advertisers' contracts into a computer which generates the daily commercial log. On-air announcers use the log to determine when to broadcast commercials. The traffic manager prepares bills for the clients based on the log. She also schedules the times for on-air promotions and contests. She receives the same fringe benefits as other full-time employees.

The receptionist works different hours on different days and is considered a part-time employee. She answers the telephones, opens mail, greets visitors, and does typing. As a part-time employee, she does not receive fringe benefits.

The Regional Director found that, in the circumstances of the instant case, the usual distinction between on-air and off-air employees had "broken down" and was outweighed by the commonality of interests among all the stations' employees. Citing *KJAZ Broadcasting Co.*, 272 NLRB 196 (1984), the Regional Director found that only an overall unit was appropriate. We disagree, and for the following reasons find that the stations' on-air personnel retain their distinct community of interest and may therefore constitute a separate appropriate unit.

In *Hampton Roads Broadcasting Corp.*, 100 NLRB 238, 239 (1952), the Board found "that when an employee regularly appears before the microphone, it is that factor, alone, and not his other duties, which gives rise to the community of interest which warrants his inclusion in the announcers' unit." That decision was based on the finding that on-air employees possessed a special talent: "Voice, diction, personality, the ability to persuade through the spoken word—these are the tests by which announcers are judged, and these are

qualifications wholly unrelated to the jobs performed by . . . others."⁷ The Board has followed *Hampton Roads* in subsequent cases. For example, in *Pulitzer Publishing Co.*, 203 NLRB 639, 641 (1973), the Board respected "[the] recognized distinction for bargaining purposes in the radio and television industry between [off-air employees] and announcers or broadcasters who are generally considered 'talent.'"

Although the panel majority in *KJAZ*, supra, found that a unit limited to on-air announcers was inappropriate, they expressly disclaimed any intent to overrule *Hampton Roads*. (272 NLRB at 197 fn. 10.) Rather, the Board concluded that the usual distinction between on-air and off-air employees had "broken down" because off-air employees regularly worked with on-air employees in producing commercials, editing copy, reworking sample tapes, completing the play list, recording telephone announcements, issuing press releases, and other activities. More specifically, sales employees spent 50 percent of their time at the studio, wrote almost 75 percent of the advertising copy, and had frequent and daily contact with the programmers in producing commercials. One sales employee spent 20 percent of his time taping commercials for on-air use. Other employees also regularly worked with on-air employees; for example, two traffic employees worked with on-air employees in producing commercials. The receptionist also spent at least 2 hours a day working with the programmers. Thus, the Board concluded that there was a close functional relationship among all the employees, and that there was no clearly evident delineation of job duties or functions.

We find that *KJAZ* is distinguishable. *KJAZ* is a narrow exception to the long-recognized distinction for bargaining purposes between on-air and off-air employees. Although the distinction in this case may be somewhat blurred, we find, contrary to the Regional Director, that it has not "broken down" as found by the Board in *KJAZ*.

The principal factor that distinguishes this case from *KJAZ* is the much more limited role that sales employees have in producing commercials. In *KJAZ* the sales employees wrote nearly 75 percent of the advertisement scripts. Here, although the sales employees sometimes write scripts, the record fails to show that they do so with any regularity or frequency. Rather, the regular method is that sales employees submit production orders, based on the sales contracts and their discussions with clients, from which the on-air personnel write scripts and produce the commercials. In *KJAZ* one sales employee regularly taped commercials for on-air use. Although on-air employees in this case occasionally use off-air employees for special non-professional voices in taping commercials, the record

⁶The only other example of an employee other than an on-air employee broadcasting live was a prank played on the receptionist by one of the announcers.

⁷ 100 NLRB at 239, quoting from the dissent in *Hampton Roads*, 98 NLRB 1090 (1952), which the Board adopted in the later *Hampton Roads* decision.

fails to show that this is done with any degree of regularity or frequency. Here, the on-air employees are responsible for the actual production of commercials.⁸ By contrast, in *KJAZ* on-air and off-air employees were jointly responsible.

Other factors support the application of the *Hampton Roads* distinction in this case. On-air employees are hired for their talents. The Employer requires on-air employees, but not sales employees, to have experience. Sales employees and announcers do not interchange work. Indeed, it is unusual for on-air employees of one station to fill in even for on-air employees at the other station because of their “different talents,” as General Manager Wunsch testified.

On-air announcers work irregular hours geared to the programs they air. Other employees generally work regular hours. Full-time announcers are paid salaries. Sales employees are paid commissions. This difference is illustrated by the way in which the one dual-function employee is paid. He receives a salary for on-air work and commissions for sales work. There is no evidence

⁸General Manager Wunsch testified that “certainly [on-air announcers] would be the ones to produce the commercial once the script is written.”

that sales employees receive additional compensation when they sometimes write advertisement scripts or when they are infrequently heard on the air, either in taped commercials or live.⁹ Other community-of-interest factors present here, such as common supervision¹⁰ and uniform benefits are not sufficient to find that the *Hampton Roads* distinction between on-air and off-air employees has been eviscerated.

For the reasons stated above, we find that the on-air personnel have retained their distinct community of interest recognized in *Hampton Roads*, supra. Accordingly, we reverse the Regional Director’s decision and shall remand the case to her for further appropriate action.

ORDER

This case is remanded to the Regional Director for Region 1 for further appropriate action consistent with this Decision on Review and Order.

⁹Contrary to the suggestion in *KJAZ*, 272 NLRB at 197 fn. 6, we find the different methods of compensation material.

¹⁰Although the on-air announcers and sales employees have the same supervisor, Wayne Wunsch, the impact of this factor is diminished by the coordinating roles played by the nonsupervisory program and sales managers.